Supreme Court, U.S.
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No. 94-1209

In The
Supreme Court of the United States
October Term 1994

DANIEL KAMIN, ROBERT KAMIN, HERMAN KAMIN AND DAVID SILVERBLATT,

Petitioners

vs.

T.L.C. SERVICES, INC.,

Respondent

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Robert H. Lugg
LUGG AND LUGG

Attorney for Respondent

350 East Water Street
Lock Haven, PA 17745
(717) 748-2481

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STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

A) Are the Commonwealth of Pennsylvania's "Private Road Act" and "Eminent Domain Code" purposes indistinguishable?

B) Is the "Private Road Act" without procedure due process?

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STATEMENT OF THE CASE

On February 21, 1989 the Respondent filed a petition pursuant to 36 P.S. 2731 et seq, Private Road Act, requesting that a Board of View be appointed. The Court of Common Pleas appointed a Board consisting of three (3): an attorney, surveyor and real estate appraiser. In accordance with the "Private Road Act" the Board convened to decide two issues. First whether the Respondent's need for an easement for a road right of way are "necessary." Secondly, out of the initial hearing and view the Board decided the approximate course of the right of way.

In the matter at Bar, the Board of View did conclude the "necessity" of the

Respondent-Condemnor's right to an easement for a vehicle right of way. Exceptions were filed to the Board's decision but dismissed by the Court of Common Pleas.

The next stage of these bifracted procedures involved preparation of a survey along the course laid out by the Board of View with a proposed width incorporated in the survey. After notice to the Respondent and hearing before the lower Court, the lower Court established the width and exact direction of the right of way-easement. Objections were made and dismissed. An appeal was made to the Pennsylvania Commonwealth Court, and after reviewing the issues now before this Court, the

Commonwealth Court found in favor of the Respondent. The Petitioner filed a Petition For Certiorari to the Pennsylvania Supreme Court which was denied. The matter is now before this Court.

Once the appeals at this stage are decided, the next and final stage of the proceeding is to establish damages. Once damages are established and paid for by the Respondent the road right of way can be open. 36 P.S. 2736

SUMMARY OF ARGUMENT

The Petitioner's argument purports the unequal treatment of individuals when a private individual condemns a right of way versus when a public entity condemned a right of way. It is the Respondent's argument that the "Private Road Act" has a much more limited use yet provides for procedural due process and full compensation to the condemnee. The "Private Road Act" condemnation power is very limited in relation to the State's power under the Eminent Domain Code. Appellants argue that they are similar in purpose and effect but because these statutes are procedurally

different equal protection is denied. This argument is specious. Not only are the procedures different but so are their purposes; therefore, it is error for the Petitioner to argue equal laws are applied unequally to different classes of litigants.

ARGUMENT

The condemnor's powers under the "Private Road Act" is very limited. The right to condemn is limited to a road easement and then only if the condemnor had no viable highway access and had reasonable necessity for a private road to gain access to a public right of way. Mandracchia vs. Stony Creek Real Estate Corp., 609 A2nd 871, 148 Pa Commwlth 80, 1992. The individual cannot like a public entity condemn "any interest" in "any individual's" property merely to promote the public interest. Eminent Domain Code Sec. 1-303, Private Road Act 36 P.S. 2732. Under

the "Private Road Act" the individual is unable to condemn in fee simple, for any public purpose. Only in very limited circumstances can a condemnor condemn a neighbors lands; therefore, to argue the similarities of the laws in order to argue a violation of equal protection is done only by ignoring the two acts disparate purposes.

The "Private Road Act" originally drafted in the 1830's had framers who were possessed with a sense of fairness and due process. The due process contained in their drafting has been upheld by the Federal Courts. Marinclin vs. Urling, 384 Federal Reported 2d 872 (1967).

Due process within the "Private Road

Act requires a hearing to establish a need and to either confirm or relocate the proposed location. Further due process is shown where adequate safeguards were built into 36 P.S. 2731 et seq to insure any private taking is compensated:

36 P.S. 2736 provides:

> The damages sustained by the owners of the land through which any private road may pass shall be estimated in the manner provided in the case of a public road, and shall be paid by the persons..... at whose request the road was granted or laid out. Provided that no road shall be opened before the damages shall be fully paid. (emphasis added)

Hence this provision is consistent with the PA Constitution Act I, Section 10 which required compensation or security before a taking.

The Petitioner raises a concern about a condemnor walking away from the proceedings after an award of damages but before compensation is made. The drafters of the "Private Road Act" have provided the condemnee a safeguard:

> "In the event that the proceedings for the opening and laying out of a private rate...shall have been completed...and such proposed road not have been physically open upon the ground, and shall have remained or shall remain unopened to use for a continuous period of five (5) years...then such proceedings shall be deemed to be void and, of no effect, and the land to be taken shall revert to the owners of the land." 36 P.S. 2738 (emphasis added)

Section 2737 and 2738 answers the Petitioners' concern, if the condemnor walks away from the proceedings subsequent the

location and width of the right of way and consequent damages being established, thence, with time, 5 years, the right of way reverts to the underlying land owner. Furthermore, Section 2736 can be used as a legal basis to effectively enjoin any use or opening prior compensation being made.

The Petitioner also is concerned about compensation for attorney fees and experts involved in the underlying lawsuit. The adverse party responds by pointing out the underlying litigation involves private entities. The legislature can chose or not chose to allocate the expense of the lawsuit between the parties. In Pennsylvania, an individual sued for a right of way by

adverse possession, prescription or implication, is not entitled to an award of legal costs. The legislature has not stepped into to provide legal fees in those cases. Yet the defendant in those cases is put to legal expenses and the threat of a possible cloud of a right of way on its title. In our legal system, traditionally, the costs of litigation are borne by the parties, and so it should be in this matter.

CONCLUSION

The "Private Road Act" is a law giving the individual the right to take an easement for a road in only extraordinary circumstances such as when a parcel of land is landlocked. On the contrary, the "Eminent Domain Code" gives public entities broad powers to condemn anyones land for any use so long as that purpose or use is public. To equate equal protection with requiring parallel processes and procedures for both the "Private Road Act" and "Eminent Domain Code" is to ignore the limited circumstances in which the "Private Road Act" can be applied. Furthermore, due

process is alive and well in the "Private Road Act." Hearings are requested to establish need, location, width and compensation to be paid. The condemnee has full control of the property until compensation is paid. Although the procedures and process of these two dissimilar acts are different an intrinsic sense of due process can be found in both the "Private Road Act" and the "Eminent Domain Code". For these reasons the Petitioner's request for an appeal should be denied.

Respectfully submitted,

Robert H. Lugg
LUGG AND LUGG
Attorney for Respondents
350 East Water Street
Lock Haven, PA 17745
(717) 748-2481